STATE OF MICHIGAN

COURT OF APPEALS

ROBERT S. OLMAN, as Next Friend of ROBERT DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-Appellee,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant-Appellee,

and

FARM BUREAU GENERAL INSURANCE COMPANY,

Garnishee-Defendant-Appellant.

UNPUBLISHED
June 13, 2006

No. 258582
Grand Traverse Circuit Court
LC No. 02-022178-NO

ROBERT S. OLMAN, as Next Friend of ROBERT DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-Appellant,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant,

and

FARM BUREAU GENERAL INSURANCE COMPANY,

Garnishee-Defendant-Appellee.

No. 258991
Grand Traverse Circuit Court
LC No. 02-022178-NO

ROBERT S. OLMAN, as Next Friend of ROBERT DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-Appellee,,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant-Appellant,

and

FARM BUREAU GENERAL INSURANCE COMPANY,

Garnishee-Defendant-Appellee.

No. 259385
Grand Traverse Circuit Court
LC No. 02-022178-NO

ROBERT S. OLMAN, as Next Friend of ROBERT DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-Appellee,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant-Appellee,

and

FARM BUREAU GENERAL INSURANCE COMPANY,

Garnishee-Defendant-Appellant.

No. 259998
Grand Traverse Circuit Court
LC No. 02-022178-NO

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

MURPHY, J. (*concurring*).

I agree with the majority that the plain language of the insurance policy precludes coverage under the criminal-act exclusion, and therefore, under the facts of this case, I concur in the majority opinion. I write separately to voice my view that there may be situations in which application of a criminal-act exclusion such as the one at issue here, when considered with other policy exclusions, would be violative of public policy and unconscionable to enforce.

The insurance policy excludes coverage for "bodily injury or property damage arising out of a criminal act of an insured." Criminal act is defined in the policy as "any act or number of actions which are criminal in nature whether or not the act or actions lead to successful prosecution or conviction." Given the enormous number of actions that may technically constitute a crime or be deemed criminal in nature under our vast statutory scheme in the realm of criminal law, which can encompass intentional, willful and wanton, negligence, and strict liability crimes, and considering other standard policy exclusions, e.g., intentional-act exclusions, an insured can be left uncovered in innumerable situations and in certain circumstances where coverage should be afforded for purposes of public policy and to avoid unconscionability. The potential scenarios grow even greater in number and become endless upon consideration that the insured's actions need only be "criminal in nature" and need not be the subject of a criminal prosecution and conviction. Here, in my opinion, the act of shooting the BB gun from the hip in plaintiff's direction was clearly criminal, and a criminal conviction was obtained.

In *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005), our Supreme Court ruled that an insurance policy, like any other contract, is to be enforced as written unless a contractual provision violates the law or public policy. The Court also indicated that traditional contract defenses, such as unconscionability, are available. *Id.* Therefore, public policy and the doctrine of unconscionability can be utilized to preclude application of an exclusionary provision contained in an insurance policy.

I envision circumstances less egregious than those involved in this litigation in which the insured acts in a manner that is truly accidental or that results in a completely unforeseeable injury, but yet may constitute a crime under the Penal Code,[1] while nonetheless being an event that any reasonable person would honestly believe is protected through insurance and not subject to a criminal-act exclusion.[2] Intentional criminal behavior is how an ordinary insured would likely interpret the criminal-act exclusion. However, because the circumstances here are such that it is appropriate to apply the criminal-act exclusion, as written and distinguishable from *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004), I see no reason to invoke public policy or the contract defense of unconscionability to limit the reach of the exclusion.[3]

I respectfully concur.

/s/ William B. Murphy

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[1] The Legislature has seen fit to outlaw everything from blasphemy, MCL 750.102, to operating a bucket shop, MCL 750.126.

[2] Indeed, protecting against an "accident" is the quintessential purpose of insurance as reflected in standard policy language, including the language here, that defines an "occurrence," which triggers coverage, as an "accident." Black's Law Dictionary (7th ed) defines homeowner's insurance as "[i]nsurance that covers both damage to the insured's residence and liability claims made against the insured (*esp. those arising from the insured's negligence*)." (Emphasis added.)

[3] It is also arguable that enforcement of a comparable criminal-act exclusion in actual "accident" situations would violate the Uniform Trade Practices Act, MCL 500.2001 *et seq.*, as an unfair practice in the business of insurance. As noted above, a violation of law is recognized in *Rory* as an exception to strict construction and application of an insurance policy. *Rory, supra* at 491.